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STRENGTHENING THE LEGAL FRAMEWORK OF THE OSCE SYMPOSIUM

## Legal personality for the OSCE?

Some observations at the occasion of the recent conference on the legal status of the OSCE

ISABELLE LEY — 8 August, 2016



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Should the OSCE finally be endowed with legal personality? I have a hard time positioning myself in the debate. Obviously, I understand the argument – brought forward at the conference on the legal framework of the OSCE mostly by practitioners working at the organization, but also by Niels Blokker (see the [introductory post](#)), – that legal personality would make work at the organization much easier. It is quite apparent that the OSCE would profit from being able to open a bank account, generally being able to enter into contracts of any kind, or enjoying standing before courts. And I see that it seems adequate for an organization exercising robust functions as in the ongoing OSCE Special Monitoring Mission to Ukraine, where it helped to facilitate and monitor a ceasefire, to possibly be held responsible under international law. It seems that the OSCE would not do much more with legal personality – but it would do the same things with greater legal certainty and relieved from the necessity to work around its basic defect all the time.

I also understand and sympathize with the very strong “Klabbersian” argument presented by Ramses Wessel that the parties at the table should face legal realities and end “living in a phantasy world”: An institution calling itself an organization, acting with remarkable autonomy from its members and claiming personality should live up to its truth and stop circumventing the legal order it is governed by. As the head of OSCE legal services, Lisa Tabassi, argued: The OSCE has a membership, organs, procedures, institutional structures, internal regulations, an internal justice system, an administrative head and has a will of its own. It is granted observer status in the UN and it is often, mission by mission, granted immunities. If legal personality were a matter of legal reality, as Rosalyn Higgins argues, there would be no doubt that the OSCE enjoys it.

Apparently, its participating states (not to be called members!) want OSCE missions to be present at most of the critical contact points between Russia and Europe and engage in various missions of boundary management, disarmament, election monitoring and ceasefire monitoring in places like Kosovo, Chechnya, Moldova, Ashgabat, Gukovo and Donetsk, places where often no other international organizations are present. In some ways, the OSCE seems to enjoy a status similar to the UN: No one loves it, but somehow everybody senses that we are better off with an OSCE in place than without it. It seems a rather minor and only logical step to end costly obstacles in the functioning of the organization and get away with the constant working around its defect.

### **A place for open debate**

On the other hand, it seems that a strong case can be made against the formal legalization of the OSCE: It is widely agreed that the organization has had a significant impact in allowing smooth and informal communication between the Western and Soviet blocks as well as in working in important ways towards the democratization of the new Eastern European states before, during and after the fall of the Berlin Wall. In a way, one could make the argument, that the *Conference for Security and Co-operation in Europe* (as it was initially called in explicit reference to its informal status) had fulfilled its function with the closure of the chapter of the European division and could have been dissolved at the time. However, it was decided in Budapest in 1994 to upgrade the CSCE to an “organization” – an organization by name, by function, but not by legal status. In hindsight it seems that the participants back then did not fully trust the concept of a unified Europe and sensed that, in the face of the reigning

internationalist spirit at the time, it might be advisable to retain that proven space for discussion, liberated from high expectations.

One of its easily overlooked, arguably strongest points is being what it was designed to be: a venue for regular discussion, reportedly very frank, closed-doors debates between participant states' diplomats and ministers. Every Thursday, the OSCE Permanent Council in the form of all ambassadors to the OSCE meets in Vienna to "consult and decide on all issues pertinent to the OSCE". Therefore: Maybe there is an argument to be made for preserving the *status quo* and not pushing overly in the direction of formal legalization – it may come at the cost of losing the most precious function of the OSCE, the one of being a place for open debate between Russia and "the West", at a moment where more and more fora for open debate between these parties turn into locations of placeholder wars. As the head of the international law department at the Austrian foreign ministry Helmut Tichy said: The lack of personality was a condition for the success of the OSCE – maybe that still holds true to some extent.

Having said that, what struck me most at the conference were two very different and non-related observations on international organizations in general:

First, there is a need to discuss and find more consensual ways of how to evaluate the "effectiveness" of an organization. The opinions on the effectiveness of the OSCE ranged from Lisa Tabassi describing OSCE as one of the operationally most effective organizations she knows, as being small, cheap, speedy in making consensus decisions and being able to move quickly. Tanja Börzel, on the other

hand, stressed the point that measuring it against its self-proclaimed goals of securing peace and stability in Europe (actually the OSCE homepage lists not less than 20 different areas of focus of the organization!), the political science literature considers the OSCE as one of the least effective and irrelevant IOs. Laurence Boisson de Chazournes made a similar point with regard to the organization's wide-ranging external relations to other organizations: She sketched a picture of manifold engagements and blurred competences, giving the impression that the OSCE sometimes needs to compensate for the lack of personality by activism. It seems that there is a very effective side of the OSCE, at least if the mandates of the OSCE missions are used as a yardstick. Because of the discordance regarding the basic questions, however, there is an ambivalence with regard to these successes and a hesitance to talk about them too loudly.

### **An illustration of a deeper lying disagreement**

Finally, one got the impression that the schizophrenic state and mutually blocking intentions with regard to the OSCE's role and future are quite telling of underlying more general political tensions and currents at the moment: The American and the Russian proposal of how to overcome the current stalemate are not even too far apart in content (the US preferring a convention on legal status and immunities questions, while Russia aims at a constituent treaty). It rather seems to be a lack of agreement on the general direction of international relations and law that stands in the way: disagreement on the question whether we still want to further internationalist projects or whether to give in to prevailing nationalist sentiments, deep-running tensions between Russia and the West and a general zeitgeist opposed to the founding of new organizations. These insecurities may

unfortunately outweigh the functioning of an institution which contributes in small, uneventful, but important ways to the cautious stabilization of Europe's trouble spots.

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